

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 13, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP2527-FT

Cir. Ct. No. 2005IN138

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE ESTATE OF TILLIE R. ZAHROBSKY:

**SCHOOL DISTRICT OF EDGAR AND SCHOOL DISTRICT OF
EDGAR AREA EDUCATION FOUNDATION, INC.,**

APPELLANTS,

V.

WADE BLAKEY,

RESPONDENT.

APPEAL from a judgment of the circuit court for Marathon County:
PATRICK M. BRADY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. The School District of Edgar and the School District of Edgar Area Education Foundation, Inc., (collectively, the District)

appeal a judgment interpreting a codicil to Tillie Zahrobsky's will.¹ The District argues the court's determination was clearly erroneous because it ignored the codicil drafter's testimony. We conclude the court made its decision based on a credibility determination, as is proper under WIS. STAT. § 805.17(2). Therefore, we affirm the judgment.

¶2 In July 2000, Zahrobsky added a codicil to her will.² The codicil stated, in relevant part: "The excess of the value of my estate over the applicable estate exemption amount available for the year of my death shall be contributed to the Edgar High School District Scholarship Endowment Fund and/or the School District of Edgar Area Educational Foundation, Inc."

¶3 An estate exemption indicates a threshold below which an estate is not subject to taxation. In 2000, the only applicable estate exemption was the \$675,000 federal exemption. At the time, Wisconsin had no estate tax but, rather, engaged in revenue sharing with the federal government. However, the revenue sharing was discontinued and Wisconsin enacted an estate tax in October 2000. At the time of Zahrobsky's death, the Wisconsin estate exemption was \$675,000 and the federal exemption was \$1,500,000. Zahrobsky's estate was worth just over one million dollars.

¶4 Wade Blakey, one of Zahrobsky's nephews, sought construction of the codicil phrase "applicable estate exemption." Blakey maintained it referred to just the federal exemption, the only exemption applicable when the codicil was

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² There is no dispute that the will and the codicil were validly executed.

drafted. The District responded that because the original will refers to the possibility that state or federal taxes will apply, the codicil must be read to refer to both. Further, because Zahrobsky obviously intended to make a donation to the District, equity requires applying only the state exemption. A construction of the codicil that requires application of only the federal exemption means the District will not receive any money, because Zahrobsky's estate does not exceed the federal exemption.

¶5 The court held that “applicable estate exemption” was ambiguous and the ambiguity was irresolvable through context. Accordingly, the court took testimony to obtain extrinsic evidence as to the codicil's meaning. The District called Donald Howard, the personal representative as well as the accountant who had drafted the codicil. Howard asserted Zahrobsky wanted to keep the family name in the Edgar area. He also testified Zahrobsky wanted to avoid taxes on the estate, so he advised her she could avoid taxes if the value of the estate exceeding the exemption went to a charity. He stated he drafted the codicil so “anything in excess of the applicable state estate tax exemption amount” would go to the District.³ He contended that although there was no Wisconsin estate tax when he prepared the codicil, he knew the state could impose a tax in the future.⁴

³ In its brief to this court, the District states “the undisputed testimony of the lay person drafter of the Codicil was that the phrase ... meant the applicable state estate tax, as well as any applicable federal estate tax....” In addition to the testimony quoted in ¶5, Howard had written that the codicil “means the less[e]r of the federal or state exemption.” We presume the District does not mean to argue the codicil should be read to require application of both exemptions, because our understanding is that such an interpretation would have the same effect as the codicil referring to only the federal exemption.

⁴ Howard noted that, at various professional seminars he would attend, the usual advice was to advise clients to draft their wills to address “as much as you could that [which] would happen in the future, and if you limited the will to a federal or state exclusion, you could probably get caught along the road if you didn't change it when something did change.”

¶6 Attorney Mark Bradley testified as an expert for Blakey. Bradley stated Zahrobksy could not have intended to avoid Wisconsin estate tax implications because no such tax existed when she executed the codicil. Bradley intimated that in 2000, even the idea of a Wisconsin estate tax “wouldn’t have been in anybody’s vocabulary.”

¶7 Two other individuals also testified. Zahrobksy’s nephew George Blakey testified that Zahrobksy was not particularly philanthropic, nor did she express a desire to keep her name in Edgar. Her caretaker testified that Zahrobksy was not very involved in the community, nor did she ever express a desire to have her name live on.

¶8 The court concluded that Zahrobksy had intended to avoid estate taxes with the codicil, implicitly rejecting charitable giving as her motivation. The court was persuaded by Bradley’s testimony that a Wisconsin estate tax would have been outside even professionals’ contemplation at the time. Accordingly, the court construed “applicable estate exemption” to include only the federal exemption. The District appeals.

¶9 Although construction of a written document is generally a question of law, when an ambiguity requires the court to resort to extrinsic evidence, the question becomes one of fact. *Jones v. Jenkins*, 88 Wis.2d 712, 722, 277 N.W.2d 815 (1979). A trial court’s factual findings will be upheld unless clearly erroneous, and determinations of weight and credibility are particularly within the trial court’s province. WIS. STAT. § 805.17(2).

¶10 The District argues the court erroneously considered Bradley’s irrelevant testimony and ignored Howard’s testimony regarding Zahrobksy’s intent. But Bradley’s testimony was not irrelevant. The District contends

Zahrobsky intended to avoid estate taxes. Bradley's testimony is that she could not have intended to avoid Wisconsin estate taxes because they simply did not exist, nor did they appear to be on the horizon, at the time Zahrobsky executed the codicil.

¶11 The District maintains the court must have ignored Howard's testimony because it made no explicit finding of his credibility or the weight to be assigned to his testimony. The District cites no authority that the court must make such findings explicitly on the record. Indeed, although we would not discourage the court from making such findings on the record, we recognize that doing so is not always practical, particularly as the number of witnesses in any particular case grows. Rather, weight and credibility determinations are often implicit. Moreover, we know that the court accepted some of Howard's testimony because it found, as Howard testified, that Zahrobsky intended to avoid estate taxes.

¶12 Ultimately, this case boils down to a conflict between Howard's testimony that he was anticipating Wisconsin enacting an estate tax and Bradley's testimony that no professional would have had that mind-set. The court was more convinced by Bradley's testimony and concluded that because no one would have anticipated a Wisconsin estate tax when drafting a codicil in 2000, the phrase "applicable estate exemption" as contained in Zahrobsky's will could only refer to the federal estate exemption. This determination is supported by the record and is not clearly erroneous.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

